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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-626

HEFTEL BROADCASTING HONOLULU, INC., Petitioner

v.

GORDON Y. H. WONG, DIRECTOR OF TAXATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF HAWAII

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No.

HEFTEL BROADCASTING HONOLULU, INC., Petitioner

GORDON Y. H. WONG, DIRECTOR OF TAXATION, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

The Petitioner Heftel Broadcasting Honolulu, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Hawaii entered in this proceeding on August 17, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Hawaii, not yet reported, appears in the Appendix B hereto. The opinion of the Tax Appeal Court of the State of Hawaii, which is not a reported case, appears in Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Hawaii was dated and entered on August 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether an out-of-state licensor's delivery of film prints by common carrier or ownership of passive contract rights, granting a license of telecast rights in Hawaii but not requiring the performance of any act in Hawaii by the licensor, can constitute taxable instate "business activity" of the licensor for gross income tax purposes without a denial of due process.

2. Whether the out-of-state licensor's delivery of film prints by common carrier or ownership of passive contract rights can constitute instate "business activity" of the licensor which enjoys Hawaii privileges and benefits to the extent necessary to confer on Hawaii the power to subject the licensor's business activity to a gross income tax without a denial of due process.

3. Whether the out-of-state licensor's delivery of film prints or ownership of contract rights is instate activity reasonably severable from the licensor's interstate licensing business, which required such delivery and created such contract rights, and therefore taxable as purely local activity separate from interstate commerce.

4. If there really is only interstate commerce, whether a violation of the Commerce Clause, under the multiple tax burdens test, requires factual proof that the imposition of the tax would presently subject the taxpayer to multiple taxation, rather than merely create the risk of such multiple taxation.

STATUTES INVOLVED
HAWAII REVISED STATUTES,
CHAPTER 237, GENERAL EXCISE TAX LAW

§237-13 Imposition of tax. There is hereby levied and shall be assessed and collected annually privilege taxes against persons on account of their business and other activities in the State measured by the application of rates against values of products, gross proceeds of sales, or gross income, whichever is specified, as follows:

****

(10) Tax on other business. Upon every person engaging or continuing within the State in any business, trade, activity, occupation, or calling not included in the preceding paragraphs or any other provisions of this chapter, there is likewise hereby levied and shall be assessed and collected, a tax equal to four per cent of the gross income thereof.

§237-2 "Business", "engaging" in business, defined. "Business as used in this chapter, includes all activities (personal, professional, or corporate), engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, but does not include casual sales.

The term "engaging" as used in this chapter with reference to engaging or continuing in business also includes the exercise of corporate or franchise powers.

STATEMENT OF THE CASE

This case concerns the taxation of foreign corporations by the State of Hawaii under its general excise tax statute. The foreign corporations, engaged in the interstate business of licensing film prints and television broadcast rights, had contracted out of state to license telecast rights to Petitioner, Heftel Broadcasting Honolulu, Inc. (KGMB), a Hawaii television station. The State claimed that delivery of film prints and the ownership of contract rights by the foreign film licensors constituted engaging in business in Hawaii and levied a general excise tax on the privilege.

A. HOW THE FEDERAL QUESTIONS ARE PRESENTED

Petitioner, liable by contract for all state taxes levied against Petitioner's foreign film licensors, paid under protest the tax owed by one foreign film licensor, CBS Enterprises, Inc.(CBS), on CBS's gross income from one license contract. Petitioner appealed the taxes thus paid for CBS to the Hawaii Tax Appeal Court, the court of first instance, as a test case for all foreign film licensors.

Petitioner plead that the license agreement was not made in Hawaii, did not require any performance by CBS in Hawaii, and therefore CBS could not be taxed on business activity in Hawaii without offending Due Process and burdening interstate commerce. The Hawaii Tax Appeal Court held that CBS's delivery of the films to KGMB, and the "rental thereof for use by KGMB" was (1) activity taxable in Hawaii without violating due process, and (2) separate from interstate commerce. (Appendix A, p. 3.)

The Hawaii Supreme Court upheld the judgment of the Tax Appeal Court. In its opinion, the Hawaii Supreme Court squarely addressed the Due Process and Commerce Clause issues raised in this petition. (Appendix B, p. 1.), The Hawaii Supreme Court found local taxable activity in CBS's delivery of film prints and in CBS's "continuing dominion" over the telecast rights of KGMB. (Appendix B, pp. 5-7.)

B. STATEMENT OF THE FACTS

The State of Hawaii applied a privilege tax against the gross income of 42 foreign film licensors received for the license of telecast

rights to KGMB. The State of Hawaii levied a total of $96,890.01 in taxes, penalties, and interest for income received in 1970 through 1973.

The 42 film licensors granted to KGMB the telecast rights to feature films and syndicated television film series. The licensors negotiated the license agreements from their out-of-state offices by mail, wire, telephone, or by personal contact with mainland representatives of KGMB-TV. The licensors accepted the agreements at their out-of-state offices. None of the foreign licensors had an office, employee or agent in Hawaii. None had any local personality or instrumentality with which to solicit, negotiate, accept, or enforce a license agreement. None had requested authorization to transact business in Hawaii, and none was licensed under the Hawaii general excise tax law. The film licensors were not present in Hawaii.

Each agreement consisted of the grant of a license to KGMB to infringe television copyrights in exchange for a fee. The extent of the license granted was specifically authorized in each agreement.

Pertinent portions of the CBS license agreement, which was the basis of the test case below, are summarized as follows: The CBS agreement granted to KGMB a license to telecast a series called "Wild Wild West". The license started on October 1, 1970 and ran for three years. The license granted KGMB the use of 104 programs, each to be broadcasted no more than 4 times, in the sequence in which programs were delivered by CBS. The license authorized KGMB to edit the programs to the extent necessary to insert commercial material. The agreement specifically denied KGMB any license to use the programs except as stated above. The license to the "Wild Wild West" was granted exclusively to KGMB. KGMB could not assign its license, and CBS could not relicense its use in Hawaii during the duration of KGMB's license.

These contractual provisions defined the scope of the license. CBS did not otherwise have any dominion over the telecast rights granted to KGMB, and CBS did not otherwise retain any interest or control in KGMB's exercise of its license. (The CBS license agreement has been included at Appendix C in the event reference to its terms in desired.)

CBS by common carrier from the mainland delivered each program to KGMB in Hawaii shortly before its scheduled viewing date. CBS bore risk of loss and KGMB paid cost of shipping. KGMB returned possession of the programs to CBS by delivery to the common carrier shortly after telecast.

REASONS FOR GRANTING THE WRIT

1. THE LEVY OF THE PRIVILEGE TAX UPON CBS IS A DENIAL OF DUE PROCESS AS CBS IS NOT ENGAGED IN ANY ACTIVITY IN HAWAII.

The Hawaii Supreme Court interpreted the instate "business activity" incidence of the Hawaii privilege tax as applying to the "continuing leasing" of telecast rights in Hawaii. The Hawaii Supreme Court concluded that such activity existed as:

> "... both CBS and KGMB-TV exercised continuing dominion over such telecast rights ... [through their license agreement, and] ... even though the agreement was consummated on the mainland ... the license agreement *continued into this State."* (Appendix B, p. 5.) (Italics in the opinion.)

The Hawaii Supreme Court did not mention a single act or exercise of "continuing dominion" by CBS. That we are dealing with a federal question here was established long ago by this Court:

> "... [T]he question whether the ... acts done by the corporation ... are of such a nature as to subject it to the local authority ... must be regarded as a Federal Question." *Provident Savings Life Assurance Society v. Kentucky*, 239 U.S. 103, 112 (1915). Accord: *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954).

CBS in fact exercised no dominion over the telecast rights in Hawaii. CBS granted to KGMB an exclusive license to the telecast rights, giving KGMB alone the right to broadcast that material in Hawaii. The license agreement gave CBS no control over how KGMB exercised its telecast rights, within the framework of the license agreement, and there was no breach of the license agreement by KGMB. During the 3-year period of the license, CBS was not present in Hawaii, directly or indirectly, and did no act or exercised no power in Hawaii respecting KGMB's use of those telecast rights. KGMB alone exercised dominion over the telecast rights in Hawaii. As CBS exercised no dominion over the telecast rights in Hawaii, it did not engage in the business activity of "continuing leasing" in Hawaii. For a well-written analysis of this basic issue, see generally,

Filmakers Releasing Organization v. Realart Pictures of St. Louis, Inc., Mo. App., 374 S.W.2d 535 (1964).

The rights of CBS, regarding the telecast rights, consisted solely of contract terms and conditions defining the scope of KGMB's license (i.e., CBS's obligation to allow infringement of its copyrights) and CBS's right to payment. The existence of such terms, which do not require the doing of any act or the engaging in any activity by CBS, instate, cannot be said to constitute instate business activity by CBS. In *Provident Savings Life Assurance Society v. Kentucky*, 239 U.S. 103 (1915), this Court held that the mere continuance of pre-existing contractual obligations in return for premium payments did not amount to doing business instate by a foreign life insurance company, for state privilege tax purposes. The contract obligations consisted of insuring the lives of state residents. In holding that the State could not constitutionally make the mere continuance of the contracts a taxable privilege, independent of acts within its jurisdiction, this Court made the following obvious point:

> "It is true that acts might be done within the state in connection with such policies (as, for example, in maintaining an office or agents, although new insurance was not written or solicited) which could be considered to amount to the continuance of local business. In such a case it would be the actual transaction of business that would furnish the ground of the license exaction [business activity tax], and not the mere existence of the obligation under policies previously written." 239 U.S. at 113.

Petitioner concludes that CBS did not hold any contract rights or obligations that could, by their mere existence, amount to doing business in Hawaii. Petitioner claims that the levy of a business activity tax, where CBS had not engaged in any business activity in Hawaii, is a denial of due process. To survive a due process challenge, a tax on instate business activity requires material instate action. *Provident Savings Life Assurance Society v. Kentucky*, supra, *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1937). See also *James v. United Artists Corp.*, 305 U.S. 410 (1939); *Miller Brothers Co. v. Maryland*, 347 US. 340 (1954).

2. THE TAX ON CBS IS A DENIAL OF DUE PROCESS AS THE ACTIVITIES OF CBS IN HAWAII ARE NOT SUFFICIENT NEXUS TO CONFER STATE JURISDICTION TO TAX.

The basic test of State jurisdiction to tax is whether the tax bears some reasonable fiscal relation to the protection, opportunities, and benefits given by the State, i.e., whether the State has provided something for which in fairness it can ask a return. *Portland Cement Co. v. Minnesota*, 358 U.S. 450, 464-465 (1959).

The Hawaii Supreme Court held "that there was sufficient business activity by CBS in this State in its licensing agreement with KGMB-TV to justify the privilege tax." (Appendix B, p. 6.) The Hawaii Supreme Court said that the out-of-state licensing agreement, containing at best only passive contract rights of CBS, is business activity, again without explanation of how contract terms defining a license is equivalent to activity.

The Hawaii Supreme Court then concludes "that CBS extended its activities, with respect to the prints and the telecast rights so as to avail itself of the protection, benefits, and opportunities afforded by this State." (Appendix B, p. 7.)

The only so called "activity" by CBS, in regard to the prints and telecast rights, consisted of contract terms defining the scope of KGMB's license, i.e., contract terms defining the scope of CBS's license obligation. Petitioner contends that while State protection might have been given to KGMB in the exercise of its license, no protection was given CBS's contract rights.

In *Provident Savings Life Assurance Society v. Kentucky*, supra, the Court held that a foreign insurance company, by the continuance of life insurance obligations within the state, did not avail itself of the privileges of the state so as to subject the premiums received from Kentucky policyholders to the state's privilege tax. In holding that there was a denial of due process, this Court gave the following explanation:

> "As a privilege tax, the tax rests upon the assumption that what is done depends upon the state's consent. But the continuance of the contracts of insurance already written by the company was not dependent on the

> consent of the state .... [T]he state cannot destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the state's control." 239 U.S. at 113-114. (Citations omitted.)

The forceful reasoning of this case applies here. Neither CBS's contract rights with Petitioner nor its out-of-state activities depended upon the State of Hawaii for their existence or continuance. See *Connecticut General Life Insurance Co. v. Johnson*, supra.

As an alternative ground, the Hawaii Supreme Court suggests that even if all leasing activity by CBS was out of state, CBS's delivery of the film prints by common carrier was sufficient business activity to confer state jurisdiction to tax. (Appendix B, pp. 5, 7.)

In *National Bellas Hess, Inc. v. Ilinois*, 386 U.S. 753, 758 (1967), the Court held that delivery by common carrier was not activity receiving sufficient benefits from the State to confer jurisdiction to tax a foreign corporation. *National Bellas Hess* noted that the least amount of activity that this Court had held sufficient to find that an out-of-state corporation was "accorded the protection and services of the taxing State," was ten salesmen conducting continuous local solicitation in *Scripto v. Carson*, 362 U.S. 207. *National Bellas Hess, Inc. v. Illinois*, supra at 757. Petitioner concludes that delivery by CBS, through common carrier, cannot be made the basis of an activity tax without offending the Fourteenth Amendment.

In summary, petitioner contends that: (1) even if the continuance of contract terms or the delivery by common carrier somehow might be thought to amount to instate "business activity" so as to provide technical minimum contacts for a tax, (2) such continuance or delivery does not in any way avail itself of state privileges, and thus the state is not providing something for which in fairness it can ask a return in the form of a privilege tax. Compare *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), with *Scripto v. Carson*, 362 U.S. 207 (1960).

3. THE TAX ON CBS BURDENS INTERSTATE COMMERCE BY TAXING THE FEDERAL PRIVILEGE OF ENGAGING IN INTERSTATE COMMERCE.

The Hawaii Supreme Court held that (1) the delivery of the films and (2) the presence of KGMB's exclusive license within the State, constituted local activity by CBS separate from the interstate license agreement that they were pursuant to. Such local activity was held to be intrastate in nature and taxable without burdening the privilege of engaging in interstate commerce. The Court went so far as to hold ". . . no part of CBS's income was derived from the interstate aspects of its dealings." (Appendix B, p. 8.)

All theoretical niceties to the side, the Hawaii Supreme Court has gone way too far in concluding that KGMB's license or CBS's contract rights somehow gives rise to activity by CBS in Hawaii that is severable from the interstate license agreement. It must be remembered that CBS has no local presence in Hawaii. Petitioner claims that the local "activity" by CBS, such as it is, is certainly not separate from the interstate transaction that gave rise to it under any fair reading of prior Supreme Court cases.

In *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951), an interstate trucking business was held to include the local activities of: (1) maintaining two truck terminals, (2) gathering freight by pickup truck for deposit at the terminals, and (3) delivery and pickup by freight trucks at the terminals or at the customers' businesses.

In *West Publishing Co. v. McColgan*, 328 U.S. 823 (1946), affirming 27 Cal.2d 705, 166 P.2d 861 (1946) the local activities–drumming business, receiving payments, handling local collections and adjustments–of four lawbook solicitors operating out of local offices were considered activities in interstate commerce, not separate from the interstate business.

In *Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), an interstate lumber sales business included local activities, which were not severable from the interstate business, of: (1) maintaining a sales office with four personnel, and (2) otherwise engaging in "regular and systematic" solicitation. In upholding fairly apportioned direct taxes on net income from exclusively interstate commerce, the Supreme Court very

carefully distinguished unconstitutional privilege taxes measured by income from such activity.

> "It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions from the States. *Gibbons v. Ogden* (U.S.) 9 Wheat. 1, 6 L.Ed. 23 (1824) . . . [I]t is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce, *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951)." *Portland Cement Co. v. Minnesota*, supra at 458.

Of course, if a foreign corporation enters a state and establishes a constant pattern of very substantial local business activity through "a maze of local connections," then it may waive its immunity from a tax measured by its gross income from within the state on interstate commerce, which its mere entry into the state would not have taken away. See *General Motors Corp. v. Washington*, 377 U.S. 436, 448 (1964). But only limited local incidents will *not* sustain such a tax against attack under the commerce clause. *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359 (1954). Here, of course, there really are *no* local activities; all real activities of the film licensors are out of state.

In *Paramount Pictures Distributing Co. v. Henneford*, 184 Wash. 376, 51 P. 2d 385 (1935), the Washington Supreme Court held that delivery of films from a foreign film lessor to local theatres through a local delivery office of the lessor was an integral part of the interstate film leasing business. In addition, the court held that the lessor's instate activity of maintaining a branch office in charge of a local manager for the purpose of soliciting leases, delivering films and receiving them back was not separate from the interstate business. Other film distribution tax cases are in accord. *Gross Income Tax Division v. Warner Bros. Pictures Distributing Corp.*, 233 Ind. 345, 118 N.E. 2d 117 (1954); *State v. Paramount Publix Corp.*, 178 La. 818, 152 So. 534 (1934). See also *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291, at 309 (1923). But see *Boswell v. Paramount Television Sales, Inc.*, 291 Ala. 490, 282 So. 2d 892 (1973).

The "activity" of CBS in Hawaii, said by the Hawaii Supreme Court to somehow be generated by the presence of KGMB's license or the contract rights of CBS defining that license, is certainly much less severable from its interstate licensing business than the activity of Paramount's branch office that takes care of local aspects of its interstate leasing business. In *Paramount Pictures* there is at least a separate office and a clear delegation of all delivery and exchange functions of the interstate business to that local office. In our case, "activity" could only stem from the license or the contract rights of CBS that are the very core of the interstate license agreement. If the Hawaii Supreme Court is taxing any activity at all, it is taxing activity inseparable from the interstate licensing itself. It is taxing the privilege of engaging in interstate business.

This is a privilege tax measured by gross income, not a property tax or a tax on net income properly apportioned. Accordingly, on the facts at issue, imposition of the Hawaii privilege tax violates the Commerce Clause since it falls upon the privilege of engaging in exclusively interstate commerce.

4. THE TAX ON CBS OFFENDS THE COMMERCE CLAUSE BY IMPOSING MULTIPLE BURDENS ON INTERSTATE COMMERCE.

The levy of the gross income tax upon CBS clearly exposes it to the risk of multiple tax burdens since the Hawaii tax reaches the entire gross income from the license agreement.

The business of CBS of producing, licensing, and distributing films is a unitary interstate business. See *Binderup v. Pathe Exchange, Inc.*, and the other cases cited in Part 3, supra. The gross income from the license is atrributable to all the activities of the business, including the licensing activities which took place on the mainland, the activities involved in CBS acquiring the films for license which took place on the mainland, and other activities of CBS at its commercial domicile relevant to the license agreement.

If the levy is upheld, each state in which some specific activity took place, as well as the commercial domicile of CBS, could lay the same unapportioned tax on the gross income of CBS and impose multiple burdens on interstate commerce. This risk of exposure to multiple taxation is the vice of the unapportioned gross income tax. See *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 311 (1937).

The court below erred in holding that petitioner needed to prove that the levy of the tax would currently subject the taxpayer to multiple taxation by combination with existing unapportioned taxes by other states. All petitioner need show is that the risk of multiple taxation exists. *Standard Pressed Steel Co. v. Washington*, 419 U.S. 560, 563-564 (1975).

The Hawaii Supreme Court misread *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), the case cited as authority for its position. In *General Motors*, multiple burdens were discussed in a terse complex paragraph at 448-449. Familiarity with the five cases cited is necessary in order to understand it. The taxpayer in *General Motors* merely alleged that the gross income tax on activity fairly taxable as local activity separate from interstate commerce, in combination with other constitutionally valid taxes, somehow created a multiple burden. In short, taxpayer alleged that two rights created a wrong. The Court held that this "formula" had not shown that the risk of multiple burdens was created. The Hawaii Supreme Court interpreted this discussion to mean that the taxpayer must prove that a multiple burden presently exists, in order to prove a violation of the Commerce Clause under the multiple burdens test. (Appendix B, pp. 4, 9.)

In *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1937), cited in *General Motors*, and in numerous other cases, the United States Supreme Court has found commerce clause violations due to the risk of multiple taxation without a showing that multiple taxation presently exists. Petitioner concludes that the levy of the unapportioned gross income tax exposes CBS to the risk of multiple taxation, and that such risk is offensive to the Commerce Clause.

5. THE DECISION BELOW REAFFIRMS A LINE OF STATE CASES UNCONSTITUTIONALLY BROADENING THE PERMISSIBLE REACH OF A TAX INCIDENCE AND THE BOUNDARIES OF STATE POWER TO TAX.

The test of state power to tax phrases the due process requirements broadly: whether the State has given anything for which it can ask a return, or whether the foreign corporation has availed itself of

any state privilege for which it ought to pay a tax. This test states the fullest extent of a state's power to tax; it does *not* define the incidence of a tax levied on "business activity."

The Hawaii Supreme Court, in upholding the levy of the activity tax upon CBS, has unconstitutionally broadened the definition of "business activity" and the boundaries of state power to tax.

The Court below, and a few other state courts, have done so by misapplying the due process test of state power to tax in two ways: (1) by concluding that power to tax the activities is present without showing that instate activities of the foreign corporation have enjoyed state privileges (Appendix B, pp. 6-7); and (2) by using the conclusion of power to tax the activities to preclude examination of what should have been the first question, i.e., whether sufficient instate "activity" existed to form a basis for the tax. (Appendix B, p. 5.) See *Boswell v. Paramount Television Sales, Inc.*, supra, (the case which prompted the State of Hawaii to levy the tax at issue here); *Besser Co. v. Bureau of Revenue*, 74 N.M. 377, 394 P.2d 141 (1964); *Stone v. Stapling Machines Co.*, 220 Miss. 470, 71 So.2d 205 (1954).

In Petitioner's case, the due process clause really asks two questions in determining whether an activity tax is proper: (1) whether sufficient "activity" exists within the state, *Provident Savings Life Assurance Society v. Kentucky*, supra, and (2) whether such activity sufficiently avails itself of state privileges to conclude that power to tax exists. *Portland Cement Co. v. Minnesota* supra. The court below and the state cases cited, however, have used an imprecise answer to the second question to avoid dealing with the first.

In Petitioner's case and in the *Bowell* case, the courts abused the generous language framing the due process requirements of the state power to tax and merely concluded that the licensors, because of their license agreements, engaged in "activity" that must enjoy some state privilege. Finding jurisdiction in this hit-skip manner, it is then easy to bootstrap a conclusion that therefore some instate licensing "activity" must exist also.

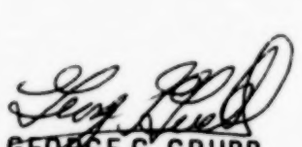
By means of this sleight of hand, the states are finding local activity where none exists and taxing interstate commerce as local commerce. Such abuse of the restrictions of due process and the Commerce Clause, unconstitutionally enlarging their power to tax, is

significant in that such abuse, if not curbed, continues to encourage taxation by the states beyond the constitutional limits of that power.

If the decision below is allowed to stand, state courts will have a substantial line of state authority (1) disregarding the constitutional limits on the reach of an important statutory incidence of taxation, and (2) disregarding the constitutional limits on the power of a state to tax.

CONCLUSION

For these reasons, a write of certiorari should issue to review the judgment and opinion of the Supreme Court of Hawaii.



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IN THE TAX APPEAL COURT OF THE STATE OF HAWAII

HEFTEL BROADCASTING HONOLULU, INC.,	)	Case No. 1472
Plaintiff,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	)	TAX APPEAL COURT STATE OF HAWAII FILED SEP 11 12:30 PM 1974 /S/ JAMES A. SMITH
RALPH W. KONDO, DIRECTOR OF TAXATION,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for decision on stipulation of facts and the Court, having duly considered the briefs of counsel and otherwise being fully advised in the premises, makes and files the following findings of fact and conclusions of law:

FINDINGS OF FACT

This proceeding is an appeal brought by Heftel Broadcasting Honolulu, Inc. (KGMB), pursuant to HRS §232-1 and §40-35, for the recovery of Hawaii general excise taxes it paid under protest on behalf of CBS Enterprises, Inc. (CBS), which were assessed against rental income CBS derived for television films it rented to KGMB.

The facts in this case are set forth in the Stipulation of Facts and Additional Stipulation of Facts on file with the record of this appeal and the Court accordingly finds the facts as stipulated by the parties.

CONCLUSIONS OF LAW

1. HRS §237-13(10) imposes a privilege tax against persons on account of their business and other activities in the State measured by gross income not covered by the preceding subsections.

HRS §237-2 defines "business" as including all activities (personal, professional, or corporate) engaged in with the object of gain or economic benefit either direct or indirect.

HRS §237-3 defines "gross income" to mean all receipts by reason of the investment of capital of the business engaged in, including rentals.

2. Notwithstanding Plaintiff's contention that the tax upon the rental income of CBS is invalid because the performance of film license agreement with Plaintiff by CBS did not amount to carrying on business and other activities in Hawaii so as to subject the rental income derived therefrom to the Hawaii general excise tax, the Court finds that CBS is engaged in the business of renting T.V. films in the State of Hawaii and accordingly pursuant to HRS Chapter 237 the assessment of four percent upon the rental of income of CBS is a valid and proper assessment.

The presence of CBS's T.V. films in the State and its rental is sufficient local contact for the imposition of the general excise tax. The tax is imposed upon CBS for the privilege of leasing or renting the films in Hawaii. The transferring of possession of the films to KGMB and rental thereof for use by KGMB is the taxable activity which wholly occurs in Hawaii after completion of their interstate journey and before the return

of the films in interstate commerce. The tax is a valid nondiscriminating tax and is imposed upon all persons who rent or lease tangible personal property in the State whether resident or nonresident. *Boswell v. Paramount Television Sales, Inc.*, 282 So.2d 892 (Ala. 1973); *Besser Co. v. Bureau of Revenue*, 394 P.2d 141 (N.M. 1964).

3. Plaintiff also contends that the assessment is invalid because it offends the commerce and due process clauses of the U.S. Constitution. The Court disagrees with the contention of Plaintiff.

Due process requires minimum connection or nexus between the state and the transactions which the state seeks to tax. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). The test as to due process is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. *Besser Co. v. Bureau of Revenue, supra.*

The Court concludes that under the facts of the case, the presence of CBS's films in the State more than meets the minimum requirement of nexus. The films enjoyed the protection and benefits of this State when it came to rest here. The tax is entirely reasonable and proper in exchange for the protection, opportunity and benefits received.

With respect to Plaintiff's commerce clause argument, the Court concludes that the activity of renting tangible personal property in the State is not an interstate activity but a local activity which falls outside the protection of the commerce clause. Once the films came to rest in the State, they left the stream of interstate commerce and the use or rent thereof became localized and subject to taxation. Plaintiff's contention that the activity is immune from taxation is no more than an attempt to free CBS from assuming its fair share of State tax burdens. The commerce clause was not intended to relieve those engaged in interstate commerce to escape their just share of state tax burdens, merely because an incidental effect of the tax is to increase the cost of doing business. The commerce clause was intended to protect persons engaged in interstate commerce from the evils of multiple taxation. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). This is not the case here.

4. Based on the above, the Court concludes that the tax involved here is proper and a valid assessment.

5. Judgment will be entered as follows:

a. The sum of $3,614.62 paid under protest herein shall be and is hereby made a government realization.

b. The sum of $779.95 representing penalty assessed herein, shall, pursuant to the parties' additional Stipulation of Facts filed herein, be refunded to the Plaintiff together with interest at the rate of two percent per annum as provided in HRS §40-35, and costs as provided in HRS §232-23.

Dated: Honolulu, Hawaii, September 11, 1976.

/s/ Yasutaka Fukushima
Judge of the above entitled Court

APPROVED AS TO FORM:

/s/ George G. Grubb

GEORGE G. GRUBB 1075-0
22nd Floor, Pacific Trade Center
190 South King Street
Honolulu, Hawaii 96813

Attorney for Plaintiff

A TRUE COPY. ATTEST WITH
THE SEAL OF SAID COURT.

/S/ J. Smith

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Tel. No. 548-4760

Attorney for Director
of Taxation, Defendant

IN THE TAX APPEAL COURT OF THE STATE OF HAWAII

HEFTEL BROADCASTING HONOLULU, INC.,	)	Case No. 1472
Plaintiff,	)	JUDGMENT
vs.	)	FILED SEP 25 7:49 AM 1974 /S/ JAMES A. SMITH
RALPH W. KONDO, DIRECTOR OF TAXATION,	)	
Defendant.	)	

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law filed on September 11, 1974, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered as follows:

1. The sum of $3,614.62 paid under protest herein shall be and is hereby made a government realization.

2. The sum of $779.95 representing penalty assessed herein shall be refunded to the Plaintiff, together with interest at the rate of two percent per annum as provided in HRS §232-23.

DATED: Honolulu, Hawaii, September 15, 1974.

/S/ Yasutaka Fukushima
Judge of the above entitled court

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1975
--oOo--
In the Matter of the Tax Appeal of
HEFTEL BROADCASTING HONOLULU, INC., Taxpayer.
NO. 5790
APPEAL FROM TAX APPEAL COURT
HONORABLE YASUTAKA FUKUSHIMA, JUDGE
AUGUST 3, 1976
RICHARDSON, C.J., KOBAYASHI, OGATA, MENOR AND KIDWELL, JJ.

General Excise Tax Law–business–type of activity contemplated in definition

Leasing of film prints and their telecast rights, which provide income to the licensor, is the type of activity contemplated in the definition of "Business" given in HRS §237-2.

Same–same–local engaging

An out-of-state lessor of films and their telecast rights, who (1) consummates a license agreement entirely out-of-state which creates a license arrangement that continues into this State, wherein it is a source of income to the licensor and grants the local lessee telecast rights exercisable only within this State, and (2) exercises continuing dominion over such telecast rights within this State, is engaged in local "business" within the meaning of Chapter 237. HRS Chapter 237, General Excise Tax Law.

Constitutional Law–due process–State jurisdiction to tax–proper test

The basic test of State jurisdiction to tax is whether the tax bears some reasonable fiscal relation to the protection, opportunities, and benefits given by the State, *i.e.*, whether the State has provided something for which in fairness it can ask such a return.

Taxation Intangibles–where taxable–effect of taxpayer's activities outside domicile

Intangibles can be taxed by states other than the domicile of the owner where there have been sufficient contacts with the jurisdiction to make it fair and reasonable that the tax be paid.

Commerce–state taxation–commerce clause limitations

The Commerce Clause of the United States Constitution prohibits state taxes that discriminate against, or impose multiple burdens on, interstate commerce.

Same–same–general excise tax–nondiscriminatory nature

A state general excise tax that is nondiscriminatory, in that it taxes both residents and nonresidents, does not tax the privilege of engaging in interstate commerce.

Same–same–multiple tax burden–burden of proof

The burden of proving that a state tax creates multiple tax burden in violation of the Commerce Clause is upon the taxpayer.

OPINION OF THE COURT BY KOBAYASHI, J.

This appeal concerns the propriety of privilege-tax assessments by the Director of Taxation, State of Hawaii (Director), against foreign corporations that had license agreements, involving telecast rights of films, with Heftel Broadcasting Honolulu, Inc. (KGMB-TV). The assessments were for rental incomes received from KGMB-TV during a period when the foreign corporations were not physically present or engaged in any activity in the State of Hawaii (State) other than owning and renting film prints and their telecast rights, and the shipping of the films to KGMB-TV.

Heftel Broadcasting Honolulu, Inc., owner-operator of KGMB-TV, having accepted under the license agreement, responsibility for Hawaii taxes, paid under protest the taxes assessed against one film lessor, CBS Enterprise, Inc. (CBS), and brought this action to the tax appeal court as a test case for all of the film lessors concerned. (KGMB-TV and CBS are also designated as appellants herein.) The crucial issues raised by this case involves (1) a question of statutory-intent, that is, whether HRS §237-13(10) (Supp. 1975)[1] extends to out-of-state persons who have engaged in no more instate activities than the licensors were involved herein; (2) a Due Process[2] question of whether there is a sufficient nexus between Hawaii and the transactions involved to warrant jurisdiction of the State to impose the privilege tax; and (3) a Commerce Clause[3] question of whether the tax imposes an unconstitutional burden on interstate commerce.

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[1] HRS §237-13(10) reads:

(10) Tax on other business. Upon every person engaging or continuing within the State in any business, trade, activity, occupation, or calling not included in the preceding paragraphs or any other provisions of this chapter, there is likewise hereby levied and shall be assessed and collected, a tax equal to four percent of the gross income thereof. In addition, the rate prescribed by this paragraph shall apply to a business taxable under one or more of the preceding paragraphs or other provisions of this chapter, as to any gross income thereof not taxed thereunder as gross income or gross proceeds of sales or by taxing an equivalent value of products, unless specifically exempted.

[2] U.S. Const. art. I, sec. 8, cl. 3.

[3] U.S. Const. amend. XIV.

The tax appeal court accepted the parties' stipulation of facts as its findings and concluded that the tax assessments were valid and proper. From this conclusion, KGMB-TV appealed. We affirm.

FACTS

During the period in question, 1970 through 1973, KGMB-TV, as licensee under "license agreements" (agreements) with 42 foreign corporations (licensors), had the rights to telecast feature films and syndicated television film series, provided by the licensors, in the State. The agreements were negotiated by licensors from mainland offices by mail, wire, telephone or by personal contact with mainland representatives of KGMB-TV. Al agreements were consummated on the mainland. From 1970 through 1973, none of the licensors had an office or place of business in Hawaii; nor did any of them have any agent or employee residing in the State. Furthermore, none of these licensors requested authorization to transact business in Hawaii under HRS Chapter 418, Foreign Corporations, or were licensed under the Hawaii general excise tax law, HRS Chapter 237.

CBS, one of the 42 licensors and the licensor in this test case, entered into a typical agreement with KGMB-TV on February 19, 1970. The agreement granted to KGMB-TV permission to telecast 104 programs of the *Wild Wild West* series from October 1, 1970 to September 30, 1973. In return, KGMB-TV was to pay CBS a net license fee of $62,400.00 in 24 monthly installments of $2,600.00 commencing on November 1, 1970, but subject to reduction in the event of "Eliminated Broadcasts," as defined under the "Terms and Conditions" of the agreement.

Parts of the "Terms and Conditions" of the CBS-KGMB-TV agreement that we believe are significant are as follows:

. . . .

> 3. Delivery and Return of Prints. (a) CBS will deliver to Licensee, at the address specified . . . collect . . . . Delivery of the prints by CBS to Licensee, Licensee's agent or a common carrier shall be deemed to be delivery by CBS to Licensee hereunder. If deliveries are made to a common carrier, they shall be made in time normally sufficient for

> prints to reach their destination at least two (2) business days prior to date of the scheduled broadcast thereof. In the event that any print has not reached its destination at least two (2) business days prior to the date of the scheduled broadcast thereof, Licensee shall immediately notify CBS by telegram. If Licensee so notifies CBS and CBS shall not deliver to Licensee, prepaid, a replacement print of the same program, or . . . a program acceptable to Licensee . . . in time for the scheduled broadcast, such broadcast shall be deemed an "Eliminated Broadcast."
>
> (b) Licensee will examine each print immediately upon receipt thereof and will immediately notify CBS by telegram if such print is defective for broadcasting . . . . If Licensee so notifies CBS and CBS shall not deliver to Licensee, prepaid, a replacement print . . . acceptable to Licensee . . . , in time for the scheduled broadcast, such broadcast shall be deemed an "Eliminated Broadcast" . . . .
>
> (c) Licensee will return each print, prepaid, substantially in the same condition as received by Licensee . . . to CBS . . . within 24 hours . . . after the broadcast . . . . Delivery of the prints by Licensee to CBS, CBS' agent or specified addressee, or a common carrier shall be deemed to be delivery by Licensee to CBS hereunder.
>
> . . . .
>
> 6. Loss or Damage. Licensee shall immediately report to CBS any loss, theft, destruction or damage to any print or part thereof occurring between the time of receipt thereof by Licensee and the delivery thereof by Licensee as provided in subparagraph (c) of paragraph 3 hereof, and Licensee shall pay CBS a sum equal to the cost of making a new print thereof. . . .
>
> . . . .
>
> 14. ELIMINATED BROADCASTS. For each Eliminated Broadcast the Net License Fee shall be reduced by an amount equal to the Net License Fee divided by the total number of broadcasts authorized hereunder.
>
> . . . .

Noteworthy is the failure of the record to indicate whether or not the licensors were in fact subject to, or were being assessed for the rental income from KGMB-TV, taxes of the same nature as the privilege tax in question, by other taxing jurisdictions.

OPINION

I. HRS §237-13(10)

The initial issue is whether CBS, in performing the license agreement with KGMB-TV from 1970 to 1973, was "... engaging or continuing within the State in any business, trade, [or] activity ..." within the meaning of HRS §237-13(10).

Appellant's principal contention on this issue is that, "... the agreed facts demonstrate that *all* activities [including transfer of possession of the films) of the licensors, occurred on the Mainland" and so the mere physical presence of CBS' films in the State and its rental are insufficient "instate business activity" to justify application of HRS §237-13(10).

The Director, on the other hand, contends that the presence and rental of CBS' films in Hawaii constituted "economic activity" sufficient to meet the "instate business activity" requirement of the statute. Under the circumstances of the case at hand, we agree with the Director.

In reaching our conclusion, we looked to HRS §237-2 which specifies what constitutes "Business" for purposes of Chapter 237.[4] That section provides:

> §237-2 *"Business," "engaging" in business, defined.* "Business" as used in this chapter, includes all activities (personal, professional, or corporate), engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, but does not include casual sales.
>
> The term "engaging" as used in this chapter with reference to engaging or continuing in business also includes the exercise of corporate or franchise powers.

Of significance in this case, as we see it, is that in essence what CBS leased to KGMB-TV were not only the film prints but, more importantly, also the intangible telecast rights[5] of the films. These telecast rights were wholly consummable and *only consummable in Hawaii* within specific time limits.[6] And both CBS and KGMB-TV exercised continuing dominion over such telecast rights. So even though the agreement was consummated on the mainland, it was done so with the intent that performance would occur almost entirely in Hawaii. Furthermore, unlike a sale of goods that takes place on the mainland with the goods being transported here, the license arrangement *continued into this State* wherein it was a source of income to the licensor. This continuing leasing of the telecast rights performable only in Hawaii for a rental charge, we believe, is the type of activity contemplated in the definition of "Business" given in HRS §237-2. Thus, we are of the opinion that regardless of the fact that all activities in the consummation of the agreement between the parties herein occurred on the mainland, CBS was engaged in local "business" within the meaning of Chapter 237. See *Boswell v. Paramount Television Sales, Inc.*, 291 Ala. 490, 282 So.2d 892 (1973).

Furthermore, though subparagraph 3(a) of the "Terms and Conditions" (Terms) of the agreement provides that delivery of the prints to a common carrier [on the mainland] shall be deemed delivery by CBS to KGMB-TV, an overview of the remainder of the agreement, especially paragraphs 3, 6 and 14 of the Terms, convinces this court that actual transfer of possession of the films occurred in Hawaii. Our view is based principally upon the fact that the risk of nonreceipt and of

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[4] Appellant's reference to HRS §418-6 and qualification cases for determining what constitutes "doing business" instate is inappropriate. It is well-established that significantly more business activity is required for qualification purposes than for taxing jurisdiction. *Three Kinds of Doing Business*, 23 Corp. Journal 163 (1961).

Similarly, appellant's use of long-arm statute cases is without basis because those cases deal with a different test, *i.e.*, whether subjecting the foreign corporation to suit would offend traditional notions of fair play and substantial justice. This test does not turn on business activities of the corporation in the state so much as considerations affecting the convenience of the parties, the location of witnesses and the relative expense of producing them at the forum attempting jurisdiction. *Three Kinds of Doing Business, supra*..

[5] Being intangible, the telecast rights are not subject to Hawaii use tax laws which are only applicable to tangible property.

[6] Under the terms of the license agreement with CBS, KGMB-TV could telecast each film only four times within a period of around two weeks. Telecasts could only take place within the State.

nonperformance remained on CBS until KGMB-TV physically obtained possession of the films in Hawaii, in time for the scheduled broadcasts, and in acceptable condition. *See* Terms subparagraphs 3(a) and 3(b), *supra*. And contrary to appellant's implication, the risk of loss of, or damage to the film prints was on CBS except when KGMB-TV had actual possession of the films. *See* Terms paragraph 6, *supra*. Additionally, delivery of the prints by KGMB-TV to a common carrier [in Hawaii] is deemed to be delivery to CBS. *See* Terms subparagraph 3(c), *supra*.

II. **Due Process**

Somewhat overlapping, the first issue is the Due Process question, *i.e.*, whether extending HRS §237-13(10) to CBS violates due process because of a lack of "nexus" between the State and the transactions involved.

Appellant contends that "[t]he passive ownership of films, only temporarily here on the order of licensees for use by licensees at their risk and cost, in pursuance of their contract right to show the films, is not reasonably classifiable as doing business in Hawaii by the licensors of the films."

The Director argues that in this case, the presence of CBS' film in the State for rental purposes more than meets the minimum requirements of nexus for privilege tax purposes.

The basic test of State jurisdiction to tax is whether the tax bears some reasonable fiscal relation to the protection, opportunities, and benefits given by the State, *i.e.*, whether the State has provided something for which in fairness it can ask such a return. *E.g.*, *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). Similarly, it has been held that intangibles, such as the telecast rights involved here, can be taxed by states other than the domicile of the owner where there have been sufficient contacts with the jurisdiction to make it fair and reasonable that the tax be paid. *See Fidelity and Columbia Trust Co. v. Louisville*, 245 U.S. 54 (1917); *see also Curry v. McCanless*, 307 U.S. 357, 367 (1939).

We believe that there was sufficient business activity by CBS in this State in its licensing agreement with KGMB-TV to justify the privilege tax. Contrary to appellant's contention, physical presence of CBS' films was not the only contact with Hawaii. As expressed in section I, we view the licensing arrangement as a business activity that may have originated on

the mainland but in fact continued into, and indeed only had value in this State; the telecast rights were only exercisable and in fact were only exercised in Hawaii. Also, as stated earlier, the actual transfer of possession of the films occurred in Hawaii. And as expressed in *Wisconsin v. J. C. Penney Co.*, *supra*,

> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of the tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. 311 U.S. at 444.

Accordingly, we conclude that CBS had extended its activities, with respect to the film prints and the telecast rights of those film prints, so as to avail itself of the protection, opportunities and benefits afforded by this State. *See Stone v. Stapling Machines Co.*, 220 Miss. 470, 71 So.2d 205 (1954), *appeal dismissed*, 348 U.S. 802 (1954), *reh. den.*, 348 U.S. 884 (1954). We therefore deem the tax assessment to be fair and reasonable and not violative of due process.

III. **Commerce Clause**

Generally, the Commerce Clause of the United States Constitution prohibits state taxes that discriminate against, or impose multiple burdens on, interstate commerce. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938).

Appellant contends that the "business activities" that licensors were engaged in were exclusively interstate commerce, and so, the State privilege tax unconstitutionally taxes the privilege of engaging in interstate commerce. Appellant further contends that the opportunity of other states to exact taxes of a similar nature to HRS §237-13(10) from the licensors creates a multiple tax burden problem.

The Director, on the other hand, contends that the tax appeal court was correct in finding that:

> The transferring of possession of the films to KGMB and rental thereof for use by KGMB is the taxable activity which wholly occurs in Hawaii after completion of their interstate journey and before the return of the films in interstate commerce. The tax is a valid nondiscriminating tax and is

> imposed upon all persons who rent or lease tangible personal property in the State whether resident or nonresident.[7]

Although our reasoning is not on all fours with the tax appeal court, we do agree that there was a taxable activity and that it occurred wholly in this State. The income (*i.e.*, net license fee) was based solely upon the leased rights which were exercisable only in Hawaii (see Terms, paragraph 14, *supra*); no part of CBS' income was derived from the interstate aspect of its dealings.

It should be noted that we have considered the line of authority cited by appellant that considers the interstate distribution of films under lease or license agreements as entirely interstate transactions immune from state privilege tax assessments. *Gross Income Tax Division v. Warner Bros. Pictures Distributing Corp.*, 233 Ind. 345, 118 N.E.2d 117 (1954); *Paramount Pictures Distributing Co. v. Henneford*, 184 Wash. 376, 51 P.2d 385 (1935); *State v. Paramount Publix Corp.*, 178 La. 818, 152 So. 534 (1934), *United Artists Corp. v. James*, 23 F.Supp. 353 (D.C. W.Va. 1938), *aff'd on other grounds*, 305 U.S. 410 (1939). We believe that appellant's reliance upon this line of authority is misplaced. The above cited cases were based upon the conclusion of the U.S. Supreme Court in *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923), that an interstate business involving leasing and delivering of films was interstate commerce. *Binderup* was a Sherman Anti-trust Act case, however, and a careful reading of the case indicates that the Court accepted the argument of plaintiff in error that in trying to determine the interstate nature of an activity "[d]ecisions with regard to state taxation are inapplicable to the determination of questions arising under the Sherman Act." 263 U.S. at 293. The Court held that "[t]he cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause." [Citations omitted.] 263 U.S. at 311. The clear inference of this holding is that the interstate-intrastate tests are not interchangeable between the two areas. *See also Stafford v. Wallace*, 258 U.S. 495, 525-27

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[7]We believe James v. United Artists Corp., 305 U.S. 410 (1939), is not apposite.

(1922); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 245-46 (1899); *McCaw & Keating v. Tax Commissioner Fase*, 40 Haw. 121, 171 (1953), *aff'd*, 216 F.2d 700, *cert. den.*, 348 U.S. 927 (1955). For that reason we gave little weight to that line of authority. Furthermore, *James v. United Artists Corp.*, 305 U.S. 410 (1939), is not apposite. That case dealt solely with the nonconstitutional question of whether the foreign corporation had engaged within West Virginia "... in the *business of collecting incomes* from the use of real or personal property ..." (emphasis added) within the meaning of a West Virginia statute. No attempt was made by the Court to deal with the Commerce Clause questions that we are dealing with here. The Court made this explicit when it stated:

> We are not here concerned with the question whether a state, by a statute appropriately framed, may lay a tax on income derived from sources within it .... 305 U.S. at 414.

Additionally we hold that the tax is nondiscrminatory in that it is imposed upon all persons who would lease such telecast rights in this State, whether that lessor was a resident or a nonresident. We therefore hold that the tax does not unconstitutionally tax the privilege of engaging in interstate commerce.

As for the multiple tax burden problem, the burden of proof was upon appellant to establish multiple taxation. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). As mentioned earlier, the record fails to indicate whether or not the licensors were in fact subject to, or were being assessed for the rental income from KGMB-TV, taxes of the same nature as the tax in question, by other states. Accordingly, we refrain from passing on the question of "multiple taxation."

Affirmed.

/S/ William S. Richardson

George G. Grubb (Carlsmith, Carlsmith, Wichman & Case of counsel) for taxpayer-appellant

/S/ Bert T. Kobayashi

/S/ Thomas S. Ogata

Alana W. Lau, Deputy Attorney General (Ronald Y. Amemiya, Attorney General, with her on the brief) for Director of Taxation, appellee

/S/ Benjamin Menor

CONCURRING OPINION OF KIDWELL, J.

I concur in the judgment on this appeal, although I do not agree with everything that is said in the majority opinion. The tax imposed by HRS §237-13(10) falls only upon persons who engage or continue within the State in a "business, trade, activity, occupation or calling." The consummation of a rental or licensing transaction, by the delivery into the possession of the renter or licensee of the subject matter of the transaction, if such delivery takes place within the State, is sufficient activity to render taxable the income from the transaction. *Boswell v. Paramount Television Sales, Inc.*, 291 Ala. 490, 282 So.2d 892 (Ala. 1973), correctly so holds. As the majority opinion points out, a privilege tax wholly on such an activity within the State raises no significant due process or commerce clause problems. Despite some evasive language, the typical agreement before us in this case imposes on the licensor the obligation and risk of placing the films in the hands of the licensee in Hawaii. I view this as sufficient to sustain the tax and consider it unnecessary to take up the question whether the mere owning and renting of film prints and their telecast rights, without the activity in the State of such delivery, would fall within HRS §237-13(10). *Cf. James v. United Artists Corp.*, 305 U.S. 410 (1939).

/s/ H. B. Kidwell

NO. 5790

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1975

HEFTEL BROADCASTING HONOLULU, INC. Appellant, vs. GORDON Y. H. WONG, DIRECTOR OF TAXATION Appellee.	CASE NO. 1472 APPEAL FROM THE JUDGMENT FILED SEPTEMBER 25, 1974 TAX APPEAL COURT HON. YASUTAKA FUKUSHIMA, JUDGE FILED 1976 AUG 17 AM 9:19 /s/ CLEMENT J. H. CHUN CLERK SUPREME COURT

JUDGMENT ON APPEAL

NO. 5790

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1975

HEFTEL BROADCASTING HONOLULU, INC.	)	CASE NO. 1472
Appellant,	)	APPEAL FROM THE JUDGMENT FILED SEPTEMBER 25, 1974
vs.	)	TAX APPEAL COURT
GORDON Y. H. WONG, DIRECTOR OF TAXATION	)	HON. YASUTAKA FUKUSHIMA, JUDGE
Appellee.	)	

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court rendered herein on August 3, 1976, the judgment of the lower court is affirmed.

DATED: Honolulu, Hawaii, August 17, 1976

BY THE COURT:

/s/ Clement J. H. Chun
Clerk

APPROVED:

/s/ Bert T. Kobayashi
Justice

CBS ENTERPRISES INC.

PROGRAM LICENSE AGREEMENT

W.W.W. #2

AGREEMENT made this 19th day of FEBRUARY, 1970, by and between CBS ENTERPRISES INC., 51 West 42 Street, New York, N. Y. 10019 (herein called "CBS") and PACIFIC BROADCASTING SYSTEM, 1534 KAPIOLANI BLVD., HONOLULU, HAWAII (herein called "Licensee").

CBS hereby grants to Licensee and Licensee hereby accepts, a license to make the following local television broadcasts during the term hereof in accordance with the provisions set forth herein and in the Terms and Conditions on pages 2 through 4 attached hereto and hereby made a part hereof:

I. PROGRAM SERIES: WILD WILD WEST
II. NUMBER OF PROGRAMS: (104) ONE HUNDRED FOUR
III. NUMBER OF BROADCASTS OF EACH PROGRAM: (4) FOUR
IV. FREQUENCY OF BROADCASTS: not more than broadcasts per week.
V. STATION: KGMB-TV*
VI. CITY: HONOLULU, HAWAII
VII. METHOD OF BROADCAST: black-and-white only and color
VIII. OTHER LIMITATIONS: "THE CBS TELEVISION NETWORK HAS RESERVED THE RIGHT TO BROADCAST PROGRAMS IN THE SERIES UNTIL SEPTEMBER 20, 1970, AND NO SYNDICATED BROADCASTS MAY TAKE PLACE PRIOR TO SEPTEMBER 21, 1970."
IX. STARTING DATE: OCTOBER 1, 197
X. TERM: (3) THREE YEARS

*It is agreed that the license granted to KGMB-TV includes the right of Station to simulcast the pictures over TV, satellite and translator stations located in the State of Hawaii.

XI. NET LICENSE FEE: $62,400.00, payable in (24) TWENTY FOUR consecutive monthly installments of $2,600.00 each, commencing on the first day of NOVEMBER, 1970.

PRINTS TO BE DELIVERED TO: KGMB-TV
1534 KAPIOLANI BLVD.
HONOLULU, HAWAII
ATT: CECIL HEFTEL

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

PACIFIC BROADCASTING SYSTEM	CBS ENTERPRISES INC.
By /s/	By /s/
(Licensee)	

TERMS AND CONDITIONS

1. USE OF PRINTS AND PROGRAMS. Licensee shall not make, authorize or permit any use of the "prints" (as hereinafter defined) or programs other than as specified on page 1 hereof, including, without in any way being limited to, copying, duplicating, or sublicensing the use of, any program, print, or portion thereof, or authorizing or permitting the exhibition, whether by way of television broadcasting or otherwise, of any program, print, or portion thereof, in any theater, auditorium or other place to which an admission fee is charged, or doing anything which may impair the copyright in any program or portion thereof, or CBS' title to the print thereof.

2. PAYMENT. Licensee will pay CBS the Net License Fee specified in paragraph XI hereof, in installments as provided therein. No failure of Licensee, for any reason, to make any broadcast hereunder will reduce the Net License Fee, except as may be expressly provided herein.

3. DELIVERY AND RETURN OF PRINTS. (a) CBS will deliver to Licensee, at the address specified on page 1 hereof, collect, one (1) positive 16 mm. print and the sound track forming a part thereof (herein together collectively called the "prints" and individually called a "print") of each of the programs, in such sequence as CBS may determine. Each print shall be in color or black-and-white, as determined by CBS, but no broadcast hereunder shall be in color unless expressly so provided on page 1 hereof. The programs shall be broadcast in the sequence in which the prints thereof are delivered to Licensee by CBS (or, if more than one print is delivered in a single package, as specified by CBS). Delivery of the prints by CBS to Licensee, Licensee's agent or a common carrier shall be deemed to be delivery by CBS to Licensee hereunder. If deliveries are made to a common carrier, they shall be made in time normally sufficient for prints to reach their destination at least two (2) business days prior to the date of the scheduled broadcast thereof. In the event that any print has not reached its destination at least two (2) business days prior to the date of the scheduled broadcast thereof, Licensee shall immediately notify CBS by telegram. If Licensee so notifies CBS and CBS shall not deliver to Licensee, prepaid, a replacement print of the same program, or another program in the Program Series, or a program acceptable to Licensee in another program series, in time for the scheduled broadcast, such broadcast shall be deemed an "Eliminated Broadcast".

(b) Licensee will examine each print immediately upon receipt thereof and will immediately notify CBS by telegram if such print is defective for broadcasting by customary industry standards, or is otherwise not in accordance with the provisions of this Agreement. If Licensee so notifies CBS and CBS shall not deliver to Licensee, prepaid, a replacement print of the same program, or another program in the Program Series, or a program acceptable to Licensee in another program series, in time for the scheduled broadcast, such broadcast shall be deemed an "Eliminated Broadcast". Failure of Licensee to give CBS such notice with respect to any print within twenty-four (24) hours after Licensee's receipt thereof shall be deemed Licensee's irrevocable acknowledgment that such print is satisfactory in all respects.

(c) Licensee will return each print, prepaid, substantially in the same condition as received by Licensee, normal wear and tear excepted, to CBS Enterprises Inc., 535 West 46 Street, New York, New York 10036, or to such address as CBS may specify to Licensee: within twenty-four (24) hours, excluding Sundays and holidays, after the broadcast thereof or immediately upon termination or suspension of this Agreement. Delivery of the prints by Licensee to CBS, CBS' agent or specified addresses, or a common carrier shall be deemed to be delivery by Licensee to CBS hereunder.

4. TERMINATION. (a) If Licensee fails or refuses to perform any Licensee's obligations hereunder, or if at any time a voluntary petition in bankruptch shall be filed by Licensee, or if at any time an involuntary petition in bankruptcy shall be filed against Licensee and shall not be dismissed within thirty (30) days thereafter, or if Licensee shall take advantage of any insolvency law, or if a receiver or trustee of any of Licensee's property shall be appointed at any time and such appointment shall not be vacated within thirty (30) days thereafter (which events are herein individually called a "termination event" and collectively called "termination events"), then, in addition to any other rights of whatsoever nature CBS may have at law or in equity, at the option of CBS exercisable upon notice given to Licensee, all installments of the Net License Fee then due, or to become due, to CBS hereunder shall become immediately due and payable. During the continuance of any termination event, CBS may, at its option, suspend the delivery of prints hereunder, and, whether or not CBS shall have exercised such suspension right, terminate this Agreement

effective at any time by giving notice to Licensee on or before the effective date of such termination; provided, however, that in the event that Licensee pays all such installments of the Net License Fee immediately after exercise of such suspension right, CBS may not thereafter terminate this Agreement pursuant to this subparagraph (a) (unless such termination event involved any failure or refusal to perform other than non-payment of installments of the Net License Fee), and, if CBS shall have suspended this Agreement as provided in this subparagraph (a), such suspension shall automatically terminate effective on the date upon which CBS receives such payment. Regardless of the occurrence of any termination event, or failure by Licensee to make payment to CBS hereunder, CBS may, if it so elects, continue to deliver prints to Licensee without waiving any of the rights granted to CBS in this subparagraph (a). No termination or suspension of this Agreement as provided in this subparagraph (a) shall affect CBS' right to the payment of all installments of the Net License Fee as provided in this subparagraph (a).

(b) If the rights secured by CBS for the Program Series are cancelled or voided for any reason other than the fault of CBS, this Agreement shall automatically terminate effective simultaneously therewith.

5. WITHDRAWAL. In the event that CBS shall deem it necessary or advisable to withdraw any program from license due to any question concerning any rights therein or any claim with respect thereto, CBS shall notify Licensee thereof and Licensee's license shall be deemed revoked thereby with respect to such program; in such event, if a print has been shipped to Licensee, Licensee will promptly return it to CBS, collect, or, if a print has not been shipped to Licensee, CBS shall not be obligated to deliver a print of such program, or any substitute therefor, to Licensee, and the remaining number of broadcasts of such program specified on page 1 hereof shall be deemed "Eliminated Broadcasts", unless a substitute program in the Program Series, or a substitute program acceptable to Licensee in another program series, is furnished to Licensee hereunder. Any such withdrawal shall not constitute a breach of this Agreement.

6. LOSS OR DAMAGE. Licensee shall immediately report to CBS any loss, theft, destruction or damage to any print or part thereof occurring between the time of receipt thereof by Licensee and the delivery thereof by Licensee as provided in subparagraph (c) of paragraph 3 hereof,

and Licensee shall pay CBS a sum equal to the cost of making a new print thereof. Licensee shall not acquire any rights with respect to any print by virtue of any payment made pursuant to this paragraph 6.

7. EDITING. Licensee shall not cut, modify, alter or edit any print except to make necessary repairs. This restriction shall not apply to the insertion of commercial material; provided, however, that if commercial material is inserted in any print, Licensee shall, prior to return, restore such print to the condition in which it was delivered. Licensee shall not delete the copyright notice from any print. Licensee shall not delete the talent, writing, producing or directing credits from any print, but any failure to broadcast credits due to unexpected lack of time, failure of technical or mechanical facilities or other cause of a similar nature beyond Licensee's control, shall not constitute a breach of this Agreement.

8. INDEMNITY. (a) CBS will indemnify and hold Licensee harmless from and against any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees, arising from the broadcasting of any material contained in the programs; provided, however, that Licensee shall promptly notify CBS of any claim or litigation to which the indemnity set forth in this subparagraph (a) applies, and that at CBS' option, CBS may assume the defense of any such claim or litigation, in which event CBS' obligations with respect thereto shall be limited to the payment of any judgment, or settlement approved by CBS, in connection therewith.

(b) Licensee will indemnify and hold CBS harmless from and against any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees, arising from the broadcasting of any material, other than the material contained in the programs, which Licensee may broadcast or authorize to be broadcast in connection with the programs; provided, however, that CBS shall promptly notify Licensee of any claim or litigation to which the indemnity set forth in this subparagraph (b) applies.

9. LOCAL LAWS. While CBS is of the opinion that governmental agencies are without jurisdiction to require a television broadcaster to secure a license to broadcast any motion picture by television, it is understood that CBS does not make any representations or undertake any obligations with respect to the procurement of any such license.

10. TAXES. Licensee will pay all sales taxes or other taxes or charges imposed upon Licensee or CBS by any law, ordinance or requirement of any governmental body in connection with the licensing, delivery, broadcasting, possession or use, as herein provided, of any of the prints or programs, or any portion thereof.

11. NON-PERFORMANCE. If CBS fails to deliver a print for any broadcast in accordance with CBS' obligations hereunder because of "force majeure" (i.e., act of God; inevitable accident; fire; lockout, strike or labor dispute; riot or civil commotion; act of public enemy; enactment, rule, order or act of government or governmental authority [whether federal, state or local]) transportation failure or delay, or other cause of a similar or different nature beyond CBS' control, or because of nonproduction for any of the above reasons of any program as yet unproduced, or if Licensee is unable to broadcast any program on the day and hour specified herein because of force majeure, failure of technical facilities, or for other cause of a similar nature beyond Licensee's control, or because of the recapture of the broadcast time period for the purpose of broadcasting on a sustaining basis an event of public importance, the term of this Agreement shall be automatically extended for one (1) week with respect to each week of broadcasting so prevented or omitted; provided, however, that the term of this Agreement shall not in any event be extended for more than an aggregate period of four (4) weeks pursuant to this paragraph 11 and that all broadcasts scheduled to be made during the fifth (5th) and any subsequent weeks of broadcasting so prevented or omitted (if any) shall be deemed to be "Eliminated Broadcasts".

12. ASSIGNMENT. Licensee shall not assign this Agreement in whole or in part to any third party without the prior written consent of CBS. CBS may assign its rights hereunder in whole or in part to any person, firm or corporation; provided, however, that no such assignment shall relieve CBS of any of its obligations hereunder.

13. MUSIC. With respect to each musical composition contained in the programs, CBS warrants and represents that the performing rights in and to such musical composition are

(i) available for license through American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), or SESAC, Inc., or

(ii) in the public domain, or

(iii) controlled by CBS to the extent necessary to permit the broadcasts hereunder.

Licensee shall, at the sole cost and expense of Licensee, secure all performing rights licenses necessary for the broadcasting of each musical composition contained in each program, the performing rights to which fall within subdivision (i) of this paragraph 13 (which rights shall not be deemed to be included in CBS' indemnification undertaking pursuant to subparagraph (a) of paragraph 8 hereof). CBS shall, at the request of Licensee, furnish Licensee with the following information with respect to each musical composition contained in each program: name or other identification; composer (if known); publisher (if any).

14. ELIMINATED BROADCASTS. For each Eliminated Broadcast the Net License Fee shall be reduced by an amount equal to the Net License Fee divided by the total number of broadcasts authorized hereunder.

15. OWNERSHIP. All rights and title in and to the programs and program series, including but not limited to, prints thereof and the title or titles, names, stories, plots, incidents, ideas, formulas, formats, general content of the programs and any other literary, musical, artistic or creative material included therein (other than material in the public domain) shall, as between CBS and Licensee, remain vested in CBS.

16. MATTER BROADCAST. In order to enable Licensee to perform its obligations under Section 317 of the Federal Communications Act concerning broadcast matter and disclosures relating thereto, CBS shall, in advance of the broadcast hereunder of any program, disclose to Licensee any information of which CBS has knowledge, or which has been disclosed to CBS, concerning the inclusion of any matter in any such program for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, CBS, or any employee of CBS or any other person with whom CBS deals in connection with the production or preparation of such program or any element thereof. As used in this paragraph, the term "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use in, or in connection with, any of the programs "unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark or

brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast", as such terms are used in Section 317 of the Federal Communications Act. The provisions of this paragraph requiring the disclosure of information shall not apply in any case where, because of a waiver made by the Federal Communications Commission under Section 317(d) of the Federal Communications Act, an announcement is not required to be made under the said Section 317. The inclusion in any such program of the announcement required by the said Section 317 shall constitute the disclosure to Licensee required by this paragraph.

17. EXCLUSIVITY. CBS will not license any program licensed for broadcast hereunder to be broadcast during the term of this Agreement by any station (other than the Station) the transmitter and principal studio of which shall be located in the City.

18. GENERAL. (a) The titles of the paragraphs of this Agreement are for convenience only and shall not in any way affect the interpretation of any paragraph of this Agreement or of the Agreement itself.

(b) A waiver by either party of any of the terms or conditions of this Agreement in any instance shall not be deemed or construed to be a waiver of such term or condition for the future, or of any subsequent breach thereof. All remedies, rights, undertakings, obligations and agreements contained in this Agreement shall be cumulative and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement of either party.

(c) Al notices required to be given hereunder shall be given in writing either by personal delivery, by mail or by telegraph (except as herein otherwise expressly provided) at the respective addresses of the parties hereto hereinabove set forth, or such other addresses as may be designated in writing by either party. Notice given by mail or by telegraph shall be deemed given on the date of mailing thereof or of delivery of such telegram to a telegraph office, charges prepaid or to be billed.

(d) This Agreement and all matters or issues collateral thereto shall be governed by the laws of the State of New York applicable to contracts performed entirely therein.

(e) This Agreement constitutes the entire agreement between Licensee and CBS with respect to the subject matter herein contained, and this Agreement cannot be changed or terminated orally.

(f) If any provision of this Agreement, as applied to either party or to any circumstance, shall be adjudged by a court to be void or unenforceable, the same shall in no way affect any other provision of this Agreement, or the validity or enforceability of this Agreement.

Supreme Court, U. S.
FILED
DEC 31 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-626

HEFTEL BROADCASTING HONOLULU, INC.,
Petitioner,

v.

GORDON Y. H. WONG,
DIRECTOR of TAXATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Hawaii, not yet reported, appears in Appendix B of the Petition. The opinion of the Tax Appeal Court of the State of Hawaii, which is not a reported case, appears in Appendix A of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Hawaii Supreme Court's decision of instate activity was based solely on passive contract rights as the Petition claims or on presence of the films, rental instate, performance of intangible rights instate (telecasting) and actual transfer of possession instate.

2. Whether the imposition of the Hawaii gross receipts tax on instate activities of a nonresident corporation is contrary to the due process clause of the United States Constitution.

3. Whether imposition of the Hawaii gross receipts tax on said nonresident corporation is a tax on interstate commerce in violation of the commerce clause of the United States Constitution.

4. Whether the imposition of the Hawaii gross receipts tax on said nonresident places multiple burdens in contravention of said commerce clause.

STATUTES INVOLVED

§237-13 *Imposition of tax.* There is hereby levied and shall be assessed and collected annually privilege taxes against persons on account of their business and other activities in the State measured by the application of rates against values of products, gross proceeds of sales, or gross income, whichever is specified, as follows:

* * *

(10) Tax on other business. Upon every person engaging or continuing within the State in any business, trade, activity, occupation, or calling not included in the preceding paragraphs or any other provisions of this chapter, there is likewise hereby levied and shall be assessed and collected, a tax equal to four per cent of the gross income thereof. In addition, the rate prescribed by this paragraph shall apply to a business taxable under one or more of the preceding paragraphs or other provisions of this chapter, as to any gross income thereof not taxed thereunder as gross income or gross proceeds of sales or by taxing an equivalent value of products, unless specifically exempted.

§237-2 "Business," "engaging" in business, defined. "Business" as used in this chapter, includes all activities (personal, professional, or corporate), engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, but does not include casual sales.

The term "engaging" as used in this chapter with reference to engaging or continuing in business also includes the exercise of corporate or franchise powers.

STATEMENT OF THE CASE

The petition seeks to review the judgment of the Supreme Court of the State of Hawaii, dated and entered on August 17, 1976, affirming the decision of the Tax Appeal Court in favor of the Respondent, Director of Taxation, State of Hawaii.

The Director of Taxation assessed CBS Enterprises, Inc. gross receipts taxes, penalties, and interest in the amount of $4,290.37 for the period beginning January 1, 1970, and ending September 30, 1973, on receipts realized from rental of films to the predecessor of Heftel Broadcasting Honolulu, Inc. (KGMB-TV), who is obligated under the film license agreement of its predecessor to pay Hawaii taxes imposed upon CBS, has paid said amount under protest, and brings this action for refund of said amount.

The Tax Appeal Court held that CBS is engaged in the business of renting films in the State of Hawaii and is liable for the Hawaii gross receipts tax upon its rental income. The Tax Appeal Court found that the presence of CBS' films in Hawaii and their rental constituted sufficient local contact for the imposition of the tax. The court stated that the transferring of possession of the films and rental thereof for use are taxable activities which occurred in Hawaii after completion of the interstate journey.

The Hawaii Supreme Court agreed with the argument of the Director of Taxation that the presence and rental of CBS' films in Hawaii constituted "economic activity" in the state to sustain the tax. Petition, Appendix B.4.

The Hawaii Supreme Court went one step further and found additional instate activity in the intangible telecast rights, because these rights were performable only in Hawaii.

ARGUMENT

I. CBS Is Doing Business Instate.

The taxing statute of the State of Hawaii imposes a privilege tax on all persons on account of their business and other activities in the state. It is a tax on the privilege of doing business in the state. §237-13, Hawaii Revised Statutes.

It is significant that the tax is imposed on all "other business" in addition to those enumerated in the statute. §237-13(10), Hawaii Revised Statutes. All business instate, whether consisting of sales or services, are taxable.

The measure of the tax is gross income, which includes all receipts and income of the business or businesses engaged in, including rentals. §237-3, Hawaii Revised Statutes.

The legislature has defined "business" to mean "all activities . . . engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect . . . . " §237-2, Hawaii Revised Statutes.

The argument of the Petitioner that the state supreme court found nexus solely on the basis of passive and intangible contract rights is without basis. The Hawaii Supreme Court held that "the presence and rental of CBS' films in Hawaii constituted 'economic activity' sufficient to meet the 'instate business activity' requirement of the statute." Petition, Appendix B.4.

The opinion of the court stated that CBS leased not only the film prints but also the intangible telecast rights of the films to KGMB-TV. Petition, Appendix B.5.

The Hawaii Supreme Court recognized that these telecast rights were consummable only in Hawaii. Performance of the telecasting rights would occur almost entirely in Hawaii. The telecast occurs in Hawaii and the viewers are in Hawaii. CBS exercises dominion over the films in Hawaii as owner-lessor. The activities involved are all intrastate. The Hawaii Supreme Court held there was greater instate activity than claimed by the Director of Taxation.

Radio broadcasting, which reached Hawaii audience predominantly, was sufficient activity instate to sustain the tax. *McCaw & Keating v. Tax Commissioner, Fase*, 40 Hawaii 121 (1953), affd. 216 F.2d 700, cert. den. 348 U.S. 927 (1955). The

United States Circuit Court of Appeals agreed with the Hawaii Supreme Court notwithstanding the taxpayer's argument that radio broadcasting constituted interstate commerce.

Profits realized from the sale of a membership in the New York Stock Exchange by a nonresident were subject to taxation by the State of New York notwithstanding the argument that the membership was intangible personal property. *New York ex rel. Whitney v. Graves*, 299 U.S. 366 (1937). The rationale was that the privilege which inheres in the exchange membership is the right to conduct transactions at that market place and its very nature localizes it at the exchange. "It is a privilege which can be exercised nowhere else." *Stone v. Stapling Machine Co.*, 220 Miss. 470, 71 So.2d 205 (1954), appl. dism. (1954), 348 U.S. 802, reh. den. 348 U.S. 884; *Curry v. McCanless*, 307 U.S. 357 (1939).

The nature and incident of the right to telecast is localized by virtue of the right to use the films. The privilege and right to use the films in Hawaii is the dominant feature of the right to telecast. The right to use links it to the situs of the films and brings it within the taxing power of the state.

The case of *Provident Savings Life Assurance Society v. Kentucky*, 239 U.S. 103 (1915), is distinguishable. There the court held that a state may not tax premiums received under existing contracts by a company who is no longer doing business in the state.

Involved in *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), were sales of a Delaware retail store to its customers in Delaware and a Maryland statute requiring the Delaware store to collect a tax from Maryland residents. The Delaware store had no property or receipt of income in Maryland. Significantly, this Court recognized in *Miller Brothers Co. v. Maryland, supra*, that, if the state has jurisdiction of the nonresident's property or transactions, it may reach the nonresident.

The case of *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1937), is distinguishable, because the California tax was on reinsurance contracts, which were made out-of-state and had no connection with California, except the initial insurance contracts, which were not directly involved in the reinsurance.

The case of *James v. United Artists Corp.*, 305 U.S. 410

(1939), is distinguishable. The case involved a narrow taxing statute on persons engaged within the state in collecting income from use of property. The court found that the taxpayer did not engage in the activity of collecting income within the state. The statute taxed gross receipts only on that activity.

Filmakers Releasing Organization v. Realart Pictures, 374 S.W.2d 535 (1964), does not involve state taxation and is therefore distinguishable.

II. The State Has Jurisdiction To Levy A Tax On Activity Instate.

A tax on income arising from activities instate meets the requirements of Due Process. These activities form a sufficient nexus. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940).

A state may tax property whether owned or leased, located within its boundaries though transported into the state provided interstate commerce has ceased. *Stone v. Stapling Machine Co., supra.*

See also *Boswell v. Paramount Television Sales, Inc.*, 291 Ala. 490, 282 So.2d 892 (1973); *Besser Co. v. Bureau of Revenue*, 74 N.M. 377, 394 P.2d 141 (1964).

Intangibles such as telecast rights involved here can be taxed by states other than the domicile of the owner where there have been sufficient contacts to make it fair and reasonable that the tax be paid. *Fidelity and Columbia Trust Co. v. Louisville*, 245 U.S. 54 (1917); *Curry v. McCanless*, supra; *New York ex rel. Whitney v. Graves*, supra; *Stone v. Stapling Machine Co.*, supra; *McCaw & Keating v. Tax Commissioner, Fase*, supra.

The case of *National Bellas Hess, Inc. v. Illinois*, 386 U.S. 753 (1967), is inapplicable. Involved there were sales consummated out of state. The case here involves property located instate and which are used instate to generate income for the owner of the films.

Scripto v. Carson, 362 U.S. 207 (1960), does not support Petitioner's argument. The case involved the Florida use tax which a foreign corporation was required to collect from its Florida customers. It should be noted that the United States Supreme Court found there was sufficient nexus and upheld the

collection of the tax.

Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954), cited is also inapplicable. The taxing statute was held invalid there, because it sought to tax all the income earned in the interstate business without apportionment. Clearly in the present case, the rentals are all derived instate and apportionment is not necessary. It should be noted that the Virginia statute in the above case was subsequently amended and the United States Supreme Court in *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1959), upheld the tax against the foreign corporation doing an exclusively interstate business in Virginia.

Spector Motor Service Inc. v. O'Connor, 340 U.S. 602 (1951), is also inapplicable. The taxpayer there was engaged exclusively in interstate commerce, and the tax involved was on the franchise to do interstate business. In addition, the holding of *Spector* has been narrowed by the later decision in *Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

III. The Tax Is Not A Tax On Interstate Commerce.

Congress has not pre-empted the field of state taxation of television films or telecasting of television films.

The case of *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923), is not applicable because an Act of Congress to prevent combinations and conspiracies on interstate commerce was involved.

An exhibitor of motion picture films brought an action against distributors of the film alleging that the distributors controlled distribution of all films and that all the distributors combined and conspired in restraint of trade and commerce among the several states.

There is no analogy between the power to tax and the power of regulating commerce. In *Gibbons v. Ogden*, 9 Wheaton 1, pp. 197, 198, the court said:

> "The grant of power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under considera-

tion. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states, are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities, at the same time. * * * When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

Paramount Pictures Distributing Co., Inc. et al. v. Henneford et al., 184 Wash. 376, 51 P.2d 385 (1935), is not applicable. It was based on the authority of the *Binderup* case, *supra*, which was based upon the Sherman Anti-Trust Act passed by Congress to restrain conspiracies in commerce between the states. In addition, the tax involved in *Paramount Pictures Distributing Co. Inc. et al v. Henneford, supra*, was on all gross receipts of the local film exchange in Seattle including receipts of exhibitors outside of Seattle. The court in the *Henneford* case recognized that "a tax . . . measured by a percentage of the entire business transacted, is a regulation of foreign commerce and void." The tax in our case is only on local intrastate commerce and not measured by out-of-state business transacted.

The case of *State v. Paramount Publix Corp.*, 178 La. 818, 152 So. 534 (1934), cited by Petitioner, is also based on the decision in *Binderup, supra*, and is also inapplicable.

The case of *West Publishing Co. v. McColgan*, 328 U.S. 823 (1946) affirming 27 Cal.2d 705, 166 P.2d 861 (1946), is cited by Petitioner as requiring substantial localized activities to sustain the tax. It should be noted that this case has been largely superseded by *Portland Cement Co. v. Minnesota, supra*.

IV. The Tax Is Allocated To Intrastate Sources; It Does Not Impose Multiple Burdens On Interstate Commerce.

The income subjected to the tax is not discriminatory; the tax is on local activities within the state forming sufficient nexus to support the tax. See *Portland Cement Co. v. Minnesota, supra*, wherein the court stated at page 463:

> "There is nothing to show that multiple taxation is present. We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do."

It should be noted that the income earned from the use of the film is from sources in Hawaii. This income earned in Hawaii cannot again be taxed elsewhere. The tax is not one which can be repeated by other states as to lay an added burden to the interstate movement of the films. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938).

CONCLUSION

For the reasons stated above, Respondent respectfully requests that a Petition for a Writ of Certiorari should be denied.

Dated: Honolulu, Hawaii, December 29, 1976.

Respectfully submitted,

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I hereby certify that a copy of this Brief In Opposition was served upon George G. Grubb, Attorney for Petitioner, by mailing the same to him at his office at 22nd Floor, Pacific Trade Center, 190 South King Street, Honolulu, Hawaii 96813 this date.

Honolulu, Hawaii, December 29, 1976.

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